Supreme Court, U. S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1977

No. 77-1524

PHILLIP DOUGLAS MILLER, ESQ.,
Petitioner,

vs.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY, et al.,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinions delivered in the courts below have not been as yet officially reported. The Order in the United States Court of Appeals for the Second Circuit was delivered on January 23, 1978 and the Memorandum and Order in the United States District Court for the Southern District of New York was delivered on February 4, 1977.

QUESTION PRESENTED

Does an appeal lie from a District Court's dismissal of an action against fewer than all the defendants named in the complaint and fewer than all the claims contained therein, if the District Court did not release the case for immediate appeal or direct the entry of a final judgment pursuant to Fed. R. Civ. P. 54(b)?

STATUTE INVOLVED

28 U.S.C.A. §1291 Final Decision of District Courts

> "The courts of appeals shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

STATEMENT OF THE CASE

Petitioner, a New York attorney and former employee of the American Telephone and Telegraph Company (hereinafter referred to as AT&T) filed this suit four months after he was fired from AT&T, naming as defendants AT&T and certain named and unnamed AT&T employees. In his Complaint Petitioner alleged charges of racial discrimination in connection with his hiring; terms and conditions of employment; classification and status during employment; retaliation and discharge. The Complaint further alleged that these discriminatory practices were violative of numerous laws including the First, Fifth, Ninth, Tenth, Thirteenth and Fourteenth Amendments to the United States Constitution; 42 U.S.C. §§1981, 1982, 1985(3), 2000(e) and Executive Order 11,246, 41 C.F.R. 31.12.803-1. Petitioner also alleged under the doctrine of pendent jurisdiction claims of fraud, deceit, misrepresentation, breach of contract, mental distress, trespass, defamation and violation of New York Executive Laws §§292.1, 296.1, 297.9 and the New York City Administrative Code §§B1-7.0 and 343.0.

Upon filing the Complaint Petitioner obtained an Order signed by the Clerk of the United States District Court for the Southern District of New York appointing AT&T as agent for the service of process on the individual defendants. No individual defendant had appointed AT&T to accept service on their behalf. On December 12, 1976 several copies of the Summons and Complaint were served on AT&T. No individual defendant was personally served.

Defendants moved to dismiss the Complaint on two grounds: (1) lack of *in personam* jurisdiction over the individual defendants pursuant to Fed. R. Civ. P. 12(b)(2); and (2) failure to state a claim upon which relief can be granted pursuant to Fed. R. Civ. P. 12(b)(6). In the Memorandum and Order entered on February 4, 1977, the Honorable Kevin Thomas Duffy, United States District Judge, dismissed the Complaint as to the individual defendants for lack of proper service and dismissed all claims against AT&T except the cause of action based upon 42 U.S.C. §1981 and the common law tort claims which were retained by the Court under the doctrine of pendent jurisdiction.

The District Court did not direct that a final judgment be entered and the United States Court of Appeals for the Second Circuit, *inter alia*, dismissed Petitioner's appeal as to the dismissal of the Complaint as to the individual defendants and the dismissal of certain claims because no final decision had been rendered.

REASONS WHY CERTIORARI SHOULD BE DENIED

Petitioner's appeal from an Order of the District Court which (1) dismissed his action against fewer than all the defendants and (2) dismissed less than all the claims in his complaint, was properly dismissed as premature by the Second Circuit Court of Appeals where neither a Judgment nor a *Rule* 54(b) had been entered by the District Court.

It is apparent from the recitals in the Petition that Petitioner's dissatisfaction with the District Court's decision is the only reason for his seeking a Writ of Certiorari. Not one question of law is presented which would provide those "special and important reasons" for this Court to exercise its discretion under *Rule* 19 in favor of granting the writ.[1]

As Petitioner himself puts it, the "basic issue" is whether the Supreme Court will ". . . give notice to AT&T . . . that it must treat . . . (blacks) . . . in a non-discriminatory manner," and "it is unjust and unfair to limit the trial issues to only some . . . claims . . . especially when

1. Rule 19 provides:

"1. A review on writ of certiorari is not a matter of right, but of sound judicial discretion, and will be granted only where there are special and important reasons therefor. The following, while neither controlling nor fully measuring the court's decision, indicate the character of reasons which will be considered:

"(a) Where a state court has decided a federal question of substance not theretofore determined by this court, or has decided it in a way probably not in accord with applicable decisions of this court.

"(b) Where a court of appeals has rendered a decision in conflict with the decision of another court of appeals on the same matter; or has decided an important state or territorial question in a way in conflict with applicable state or territorial law; or has decided an important question of federal law which has not been but should be, settled by this court; or has decided a federal question in a way in conflict with applicable decisions of this court; or has so far departed from the accepted and usual course of judicial proceedings, or so far sanctioned such a departure by a lower court as to call for an exercise of this court's power of supervision."

all the legal claims arose out of the same set of facts" (Petition at 3 and 4). These contentions simply do not raise any issues of any merit or substance warranting this Court's intervention.

In fact, the order of dismissal which led to this appeal is nothing more than a run of the mill determination by a district court disposing of less than all of the claims or parties in an action. Such determinations have uniformly been held to be non-appealable unless compelling special circumstances are demonstrated which would justify a departure from the finality rule of 28 U.S.C. §1291. See *e.g.*, *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 96 S. Ct. 1202 (1976); *Panichella v. Pennsylvania Railroad*, 252 F.2d 452, 455 (3d Cir. 1958), *cert. denied*, 361 U.S. 932, 80 S. Ct. 370 (1960); *Kuly v. White Motor Co.*, 174 F.2d 742 (6th Cir. 1949); *United States v. Peerless Insurance Co.*, 374 F.2d 942 (4th Cir. 1967); *Kadar Corp. v. Milbury*, 549 F.2d 230, 236 (1st Cir. 1977); *Allis-Chalmers Corp. v. Philadelphia Electric Co.*, 521 F.2d 360 (3d Cir. 1975); *Luria Bros. & Co. v. Rosenfeld*, 244 F.2d 192, 194 (9th Cir. 1957); and *Zangardi v. Tobriner*, 330 F.2d 224 (D.C. Cir. 1963).

As Judge Hastie of the Third Circuit Court of Appeals pointed out in *Panichella v. Pennsylvania Railroad Co.*, Section 1291 is not a mere technicality but is instead "an authoritative application and implementation of a basic and persisting policy against piecemeal appeals." 252 F.2d at 454. While *Rule* 54(b) of the Federal Rules of Civil Procedure permits an exception to this policy, upon proper certification by the District Court,

> ". . . 54(b) orders should not be entered routinely or as a courtesy or accommodation to counsel. The power which this Rule confers upon the trial judge should be used only in the infrequent harsh case." *Id.* at 455.

The Petitioner did not apply to the District Court for a *Rule* 54(b) order in this case and there has been no showing of special circumstances which would have justified the issuance of such an order. Nor was any issue raised in the appeal to the Second Circuit Court of Appeals concerning whether the District Court should have exercised discretion in favor of entering a *Rule* 54(b) order as is clear from the Court's Opinion. Inasmuch as *Rule* 54(b) vests the district courts in the first instance with the responsibility for determining whether an immediate appeal is appropriate, no question is presented to this Court concerning whether an immediate appeal should have been authorized. See *Gumer v. Shearson, Hammill & Co.*, 516 F.2d 283 (2d Cir. 1974).

Petitioner's reliance on *Sears Roebuck and Co. v. Mackey*, 351 U.S. 427 (1956) is, as the Court of Appeals noted, misplaced. That case actually involved an appeal which had been taken pursuant to a Rule 54(b) order entered by the District Court. Similarly, Petitioner's contention that the decision of the Court below conflicts with the Fifth Circuit decision in *O'Donnell v. Latham*, 525 F.2d 650 (5th Cir. 1976), is without merit because the appellate jurisdiction in that case arose under 28 U.S.C.A. 1292(a)(3), which expressly permits interlocutory appeals in admiralty cases.

Finally, Petitioner asserts that the District Court did not accept as true the allegations contained in his Complaint. Even if this were true—and the District Court's opinion itself belies this contention—that would not make the District Court's non-final order appealable for the reasons stated above.

CONCLUSION

For the above reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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